2000

Colman v. A. J. Butkovich and Geneva A. Butkovich, husband and wife; G. W. Anderson and Jeanne D. Banks, and all unknown persons who claim any interest in the subject matter of this action : Brief of Respondent

Utah Supreme Court

Robert W. Adkins; Summit County Attorney; Attorney for Appellant.
Ralph J. Marsh; Backman, Clark & Marsh; Attorneys for Respondent.

E OF UTAH

A. J. BUTKOVICH and GENEVA A. BUTKOVICH, husband and wife; G. W. ANDERSON and JEANNE D. BANKS, and all unknown persons who claim any interest in the subject matter of this action,
Defendants.

A. J. BUTKOVICH and GENEVA A. BUTKOVICH, his wife,
Third-Party Plaintiffs,
vs.

FIRST AMERICAN TITLE INSURANCE COMPANY, a corporation; and SECURITY TITLE COMPANY, a corporation,
Third-Party Defendants.

A. J. BUTKOVICH and GENEVA A. BUTKOVICH, his wife,
Third-Party Plaintiffs-Respondents,
vs.

SUMMIT COUNTY and PARK CITY, a municipal corporation,
Third-Party Defendant-Appellant.

Case No. 14505

RESPONDENTS' BRIEF

Appeal from an Order and Judgment of the Third Judicial District Court in and for Summit County, Honorable Ernest F. Baldwin, Judge

Robert W. Adkins
Summit County Attorney
Summit County Courthouse
Coalville, Utah 84017
Attorney for Appellant

Ralph J. Marsh
Backman, Clark & Marsh
500 American Savings Building
61 South Main Street
Salt Lake City, Utah 84111
Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF CONTENTS - Continued

Cases Cited

Texts and Briefs Cited

TABLE OF CONTENTS - Continued

Page

Statutes and Rules Cited

In The

SUPREME COURT

of The

STATE OF UTAH

WILLIAM J. COLMAN,
Plaintiff,
vs.

A. J. BUTKOVICH and GENEVA A. BUTKOVICH, husband and wife; G. W. ANDERSON and JEANNE D. BANKS, and all unknown persons who claim any interest in the subject matter of this action,
Defendants.

A. J. BUTKOVICH and GENEVA A. BUTKOVICH, his wife,
Third-Party Plaintiffs,
vs.

FIRST AMERICAN TITLE INSURANCE COMPANY, a corporation; and SECURITY TITLE COMPANY, a corporation,
Third-Party Defendants.

A. J. BUTKOVICH and GENEVA A. BUTKOVICH, his wife,
Third-Party Plaintiffs-Respondents,
vs.

SUMMIT COUNTY and PARK CITY, a municipal corporation,
Third-Party Defendant-Appellant.

Case No. 14505

RESPONDENTS' BRIEF

NATURE OF THE CASE

This is an action to quiet title to a parcel of property located in Park City, Utah, in which the Supreme Court, after an appeal, ordered the plaintiff's complaint dismissed with prejudice and held that the deed, which conveyed the property here involved from Summit County to the defendants Butkovich, was valid. Following the appeal the defendants Butkovich filed a motion in the lower court requesting an order dismissing the plaintiff's complaint and quieting title to the property in the Butkoviches.

DISPOSITION IN THE LOWER COURT

At the hearing on the defendants' motion, Summit County, though not a party to this action, appeared in court to inform the court that it desired to claim title to the property here involved. The lower court ordered the defendants to join Summit County as a third-party defendant. After the joinder and the filing of a counterclaim by Summit County, the defendants filed a motion for summary judgment. The lower court granted the motion for summary judgment and entered a decree quieting title to the property in the defendants Butkovich.

RELIEF SOUGHT ON APPEAL

The third-party defendant-appellant, Summit County, seeks a reversal of the decree entered by the lower court. Respondents, the Butkoviches, seek to have the lower court's decree affirmed.

STATEMENT OF FACTS

The appellant's statement of facts is laced with many allegations which do not appear in the record, with some facts which are irrelevant to this appeal, with argument and innuendo and, therefore, respondents will present their own statement of facts.

The defendants-respondents Butkovich obtained their title to the property by two quit claim deeds from Summit County on July 9, 1964, and April 15, 1965. Summit County had previously, in 1915 and 1940, obtained title by Auditor's Tax Deeds resulting from tax sales in 1910 and 1935. The second deed from the County was given to correct a slight error in the description on the first deed (R.62).

Mr. Butkovich took a bulldozer on the property and blocked off entrances, drove in stakes and tied ribbons on trees to mark the boundaries, and put up "no trespassing" signs. He also cleared brush off the ground and leased the property to United Park City Mines Company for use as a ski run (R.62-63, Exh.20).

The plaintiff, Colman, received a deed to the property in 1968 from a Robert T. Banks. However, there was no conveyance of any kind to Banks. Upon learning of the claim to Butkoviches to the property, Colman filed this action praying for a decree quieting title in him. Following a trial and an appeal the Supreme Court ordered Colman's complaint dismissed with prejudice and held that the deed, which conveyed the property here involved from Summit County to Butkoviches, was valid. The Supreme Court's decision

was based upon the lack of any chain of title to Colman and on the established validity of the conveyance to Butkoviches.

A more complete statement of facts and the entire chain of title leading up to the conveyances to both Colman and Butkoviches is contained in Appellants' Brief filed in the prior appeal of this case, Case No. 13868, and in the court's opinion therein, appearing in Colman v. Butkovich, ____ Utah 2d ____, 538 P. 2d 188 (1975).

Following the decision of the Supreme Court, the Butkoviches filed a motion in the lower court requesting an order dismissing the plaintiff's complaint and quieting title to the property in the Butkoviches. At the hearing on this motion Summit County, though not a party to this action, appeared in court to inform the court that it desired to claim title to the property. The lower court thereupon ordered Butkoviches to join Summit County as a third-party defendant in order that it might assert its claim to the property. Summit County was joined and filed a counterclaim asserting that it had superior title to the property and that the title of the Butkoviches was void (R.248,232).

Butkoviches then filed a motion for summary judgment claiming 1) estoppel by deed, 2) equitable estoppel, 3) Summit County conveyed its entire title to Butkoviches, since the conveyances to and from Summit County used the same description, and 4) any title acquired by Summit County inures to the benefit of its grantees, the Butkoviches (R.243). There was no dispute of any facts relating to these claims and, therefore, the lower court granted the motion for summary judgment.

The appellant's statement of facts is disputed in the following respects:

1) The statement, on page 2, as to the auditor's certification on the assessment rolls is not supported anywhere in the record.

2) The deed descriptions on pages 2 and 3 are not complete since they leave out the location as being in Summit County and the reference to the sale for delinquent taxes against the prior owners, D. C. McLaughlin Estate and Park City Townsite, which refers to only one possible tract of land.

3) The reference on page 3 to other transactions and prior negotiations with Summit County are irrelevant and accuse Mr. Butkovich of dishonesty with no basis in fact.

4) The references on page 3 to the deeds to and from Secutiy Title Company are irrelevant and do not accurately state where the description on those deeds came from.

5) The conversation quoted on page 4 does not establish Summit County's claim that Mr. Butkovich included all unclaimed land in the general vicinity--nor does anything in the record.

6) The statement on page 4 that the surveyor testified he could not locate the property described on the deed to Butkoviches is false. He testified that he could locate it (R.33-34) as did an abstractor and attorney who also testified (R.90-91,95-96).

7) The statements on page 5 that the Supreme Court rejected Butkoviches' claim of title to the property is false. This court specifically stated at 538 P. 2d 190:

> "The trial court, for some reason, emphasized what we think was an unwarranted conclusion that defendants' (Butkoviches) document of transfer from Summit County, namely, the County Deed, had a vague description.

> Expert testimony was to the effect that the description closed at a border line of Park City Townsite, by a well-known and commonly used abbreviation of "P.C." to describe the townsite situate in Summit County."

This court also said in its opinion that "Summit County obtained unquestioned title to the property for nonpayment of taxes, and sold it . . . to Butkovich in 1964." The references to Summit County as the owner related only to the time prior to the sale to the Butkoviches.

ARGUMENT

Since Summit County inserted itself into this lawsuit and attempted to challenge the title of the Butkoviches, this Court must first consider the question of whether Summit County has any right to challenge that title. This argument will, therefore, first consider that question and show why Summit County is barred from making a claim because of estoppel by deed, equitable estoppel, and because Summit County conveyed everything it had to Butkoviches and any after-acquired right of Summit County inures to the benefit of the Butkoviches. Thereafter, the points raised in appellant's brief will be countered.

POINT I

SUMMIT COUNTY HAS NO RIGHT TO CHALLENGE THE TITLE OF THE BUTKOVICHES.

A. SUMMIT COUNTY, AS THE GRANTOR IN THE DEED TO THE BUTKOVICHES, IS ESTOPPED FROM CHALLENGING ITS OWN DEED AND DENYING THE TITLE OF ITS GRANTEES.

Summit County conveyed the property here involved to the Butkoviches in 1964 by quit claim deed. In doing so Summit County transferred any interest it held in that property to the Butkoviches. If there is anything about that conveyance which is improper, it is not the right of Summit County to challenge it. This principle of estoppel by deed is well-established in the law and provides that a grantor is "estopped from denying the title of his grantee or his own authority to sell or convey." 28 Am. Jur. 2d, Estoppel and Waiver, §10. This principle operates even if the deed itself is invalid as is claimed by the appellant here. In Daniell v. Sherrill, 48 So. 2d 736, 23 A.L.R. 2d 1410 (Fla. 1950), the court held at 23 A.L.R. 2d 1417 that "regardless of the invalidity of the tax deeds, and the untruth of their recitals, the State of Florida, the grantor therein, is estopped to question the validity of such deeds and the truth of their recitals." In that case the tax deeds from the State of Florida were invalid because title to the property was held by the United States at the time of the tax assessment and sale by the State. The court stated, at 23 A.L.R. 2d 1416, "the United States, or any purchaser from the United States other than the State of Florida would be entitled to challenge the validity of the tax deeds . . . ." This principle is established

in numerous cases, many of which are discussed in the annotation, Estoppel of United States, state or political subdivision by deed or other instrument, 23 A.L.R. 2d 1419.

The purpose of this principle of the law becomes obvious when considered in light of this case now before the court. Summit County has not challenged anything about its sale of this property to the Butkoviches. There is no question raised about fraud, misrepresentation, or unfairness of the price. Summit County is now attempting to challenge its own deed only because it wants the property back, undoubtedly, because of an increase in value in recent years. It would be grossly unfair to allow such a challenge and the principal of estoppel by deed exists to prevent it.

B. SUMMIT COUNTY IS BARRED BY EQUITABLE ESTOPPEL FROM CHALLENGING THE TITLE OF THE BUTKOVICHES BECAUSE OF ITS LEVY, ASSESSMENT AND COLLECTION OF TAXES FOR ELEVEN YEARS AND BECAUSE OF ITS FAILURE TO REFUND OR OFFER TO REFUND THE TAXES COLLECTED ON THE PROPERTY.

After conveyance of this property to the Butkoviches in 1964 Summit County assessed and collected taxes thereon each year thereafter. Its present rash attempt to retake the property is barred by the principle of equitable estoppel. A party who comes into a court of equity to quiet title to property is bound by the maxim, "He who seeks equity must do equity." That this principle also applies to governmental entities is also established by Daniell v. Sherrill, supra, at 1416-17. There also the state acquiesced in the possession and improvement of the property, collected taxes on the property over many years, and failed to refund or offer to

refund the taxes collected. The court stated at page 1417, "We further hold, in addition to the technical or legal estoppel, that the facts in this case raise an equitable estoppel against the State."

Summit County's failure to do equity in this case, after its acquiescence in possession and collection of taxes over many years, raises an equitable estoppel against the County. There is no reason why the County should not be held to the same standards required of its citizens.

C. SUMMIT COUNTY IS BARRED FROM CHALLENGING THE TITLE OF BUTKOVICHES BECAUSE IT RETAINS NO INTEREST IN THE PROPERTY, HAVING CONVEYED EVERYTHING IT OWNED TO THE BUTKOVICHES.

The title to the property involved in this case was obtained initially by Summit County by auditor's tax deeds. The property had previously been assessed with taxes and upon nonpayment by the owners, tax sales resulted and the property was conveyed to Summit County in the annual "May" sales. The history of these assessments and tax sales appears in the abstract of title in evidence (Exh.11) and in the summaries of the chain of title also in evidence (Exh.11A and 11B). The important thing to note is that the legal description on the deeds from Summit County to the Butkoviches is precisely the same as the legal description used on the assessment notices, tax notices and auditor's tax deeds to the County. Therefore, the question of the vagueness or validity of the legal description on the deed to the Butkoviches does not benefit the County at all. If the description on the deed to Butkovich is vague rendering the deed void, then the description on the auditor's deed to the County

is vague, rendering it void, since the descriptions on both were precisely the same. If the auditor's deed to the County is valid, then the deed to the Butkoviches is valid, giving the Butkoviches title to the property, again because the descriptions on both deeds were precisely the same. Since the County has conveyed all the interest it received in this property, whatever that interest might be, it retains no title to this property and has no right to challenge the title of the Butkoviches.

D. ANY INTEREST ACQUIRED BY SUMMIT COUNTY, AFTER ITS DEED TO THE BUTKOVICHES, INURES TO THE BENEFIT OF THE BUTKOVICHES.

Summit County has argued in its brief that the decision of this Court in Colman v. Butkovich, supra, in some mysterious way, held that title to this property is in Summit County, even though Summit County was not a party to that action. It is true that there are two references in that opinion to Summit County as the owner of the property. In both instances, however, the reference is to the title held by Summit County after the tax deeds to the County, resulting from failure to pay taxes, and prior to the conveyance of title by the County to the Butkoviches in 1964. Of course, the County had title then and, as this court stated at 538 P. 2d 189, it was "unquestioned title". There is no holding anywhere in that opinion that Summit County now holds title.

However, should Summit County obtain any title to that property after its deed to the Butkoviches, whether by reason of this court's decision or by any other means, that title inures to the Butkoviches.

This principle of after-acquired title is also well established in the law. It is stated in 23 Am. Jur. 2d, Deeds, §294 as follows:

> "A grantor who executes a deed purporting to convey land to which he has no title or to which he has a defective title at the time of the conveyance will not be permitted, when he afterward acquires a good title to the land, to claim in opposition to his deed as against the grantee or any person claiming title under him. This rule is applicable even though the deed was by way of gift."

This principle also applies to governmental entities as is again shown by Daniell v. Sherrill, supra, at 1418.

POINT II

THE FILING OF AN UNDERTAKING REQUIRED BY SECTION 63-30-19, U.C.A., DOES NOT APPLY TO THIS CASE AND THE REQUIREMENT WAS WAIVED BY SUMMIT COUNTY SINCE IT WAS NOT ASSERTED IN ITS ANSWER.

Summit County, in Point I of its brief, has taken what seems to be a ludicrous position. The County appeared in court, while not a party to this action, and without notice or invitation, and literally demanded to be made a party so it could assert a claim to the property involved in the action. The court complied and ordered the Butkoviches to join the County as third-party defendants. Now the County suggests that the third-party complaint should have been dismissed because no undertaking was filed as required by Section 63-30-19, U.C.A. How is the County to assert its claim if the third-party complaint is dismissed? The Butkoviches would have preferred to leave the County out of the suit but joined the County at its request as ordered by the court. That order of the court was questionable and could undoubtedly have been successful

challenged on appeal. If the County wanted to assert an interest in the property, why shouldn't it file its own complaint or file a complaint in intervention in this action? In fact the Butkoviches would have no objection at all to a dismissal of the County since they had no reason to join the party from whom they obtained their deed, for the reasons set forth in Point I of this brief. It is obvious that under these conditions, Section 63-30-19, U.C.A., does not apply.

However, the County waived any right it had to invoke Section 63-30-19, U.C.A., because it failed to assert that defense in its answer which was filed long before its belated and untimely Motion to Dismiss, which asserted that section as an afterthought. Section 63-30-16, U.C.A., also a part of the act requiring the filing of an undertaking, provides that actions brought under the Act shall be governed by the Utah Rules of Civil Procedure. Rule 12(of those Rules provides:

> "A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except . . . ." (Certain defenses not applicable here).

Rule 12 obviously calls for the filing of a motion prior to the filing of an answer and if a defense, other than those excepted in the rule, is not asserted in that prior motion or in the later answer, it is waived. Summit County has therefore waived its claimed defense.

POINT III

THE LOWER COURT PROPERLY GRANTED THE MOTION FOR SUMMARY JUDGMENT AGAINST SUMMIT COUNTY BECAUSE THERE WAS NO DISPUTE AS TO ANY MATERIAL FACT.

In Point II of its brief Summit County has argued that the motion for summary judgment was granted in error. However, no reference is made to any material fact about which an issue exists. Rather the argument claims only that the lower court, in a previous trial, while Summit County was not a party, held that the deed to the Butkoviches was void and that the Supreme Court held that the County held title. The County has completely ignored the fact that this court reversed the decision of the lower court with respect to the validity of the deed to the Butkoviches. The decision of the Supreme Court was very specific on that point when it stated, at 538 P. 2d 190:

> "The trial court, for some reason, emphasized what we think was an unwarranted conclusion that defendants' (Butkovich) document of transfer from Summit County, namely, the County Deed, had a vague description. Expert testimony was to the effect that the description closed at a border line of Park City Townsite, by a well-known and commonly used abbreviation of "P.C." to describe the townsite situate in Summit County."

This part of the opinion quite clearly overturns the "unwarranted" decision of the lower court and expressly upholds the validity of the deed to the Butkoviches.

The County's claim that this court held that the County held title has been adequately refuted in Point I(D) of this brief. Suffice it to say that the language in the opinion to the effect that Summit County had <u>unquestioned</u> title before its conveyance to the Butkoviches does not give the County any claim to the property

now--some twelve years after its conveyance to the Butkoviches.

The undisputed material facts in this case appear in the Findings of Fact as follows (R.253):

> "7. That whatever title to the property here involved may have been held by Summit County was conveyed to the defendants Butkovich by deeds from Summit County in 1964 and 1965.
>
> "8. That since 1964 Summit County has assessed and collected taxes on the property here involved and has not refunded or offered to refund any of those taxes."

These facts were already in evidence in this case and are not contested by the County. The only issues to be resolved were legal issues and for this purpose summary judgment is appropriate. The lower court, therefore, properly concluded that Summit County was estopped from challenging its own deeds, was equitably estopped from challenging the defendants' title because of its failure to do equity, and had conveyed its entire rights to the property to Butkoviches and retained no rights therein.

POINT IV

THE VALIDITY OF BUTKOVICHES' TAX TITLE IS NOT RELEVANT IN THIS PROCEEDING. NEVERTHELESS, THEIR TAX TITLE IS VALID AND THEIR PROPERTY DESCRIPTION IS ADEQUATE. IF THEIR TITLE IS VOID, SO WAS THE COUNTY'S TITLE.

Summit County's challenge to the validity of the title of the Butkoviches, in Point III of its brief, is irrelevant because of Summit County's lack of standing to challenge their title, as established in Point I of this brief. Furthermore, Summit County is barred by the statutes of limitations in §§78-12-5.1 and 5.2, U.C.A., which bar any action or defense against the holder of a

tax title unless the party bringing the action or asserting the defense has had possession of the property within four years of such action. Summit County has not had any possession of this property and makes no claim to it--at any point in time. This challenge by the County should, therefore, not even be entertained by the court.

Furthermore, the County's claim that the description is void, if true, would invalidate its own title. As set forth in Point I(C) above, the description on its assessment notices and the auditor's tax deed to the County was exactly the same as that on its deed to Butkoviches. If one is void for vagueness, so is the other. The County is, therefore, attempting to invalidate the title it had but has since conveyed.

As to the claim that the deed to Butkoviches is void, the County only rehashes the assertions of the plaintiff Colman in the prior appeal of this case. Nothing new appears in this appeal and the County's argument should be adequately disposed of by Point II of Appellants' Reply Brief on the prior appeal. Without repeating the argument appearing there, the following points should be considered.

The case of Burton v. Hoover, 93 Utah 498, 74 P. 2d 652 (1937), relied on by the County on this point, held that the failure to designate the township and range in the legal description resulted in a defective title. That case has been limited, however, by the later case of Keller v. Chournos, 102 Utah 535, 133 P. 2d 318 (1943), which considered the failure to designate the township "North" and the Range "West" not fatal where the location in Box

Elder County must of necessity be "North" and "West". The court took judicial notice of such facts.

The County also relies on Howard v. Howard, 12 U. 2d 407, 367 P. 2d 193 (1962), in which a metes and bounds description in a deed was missing the last two courses and the acreage, if the missing courses were implied, was only half what the deed stated it to be. There were numerous other confusing defects in the deed and the court held it void because it was impossible to determine what the grantor intended. The court stated, however, that "the grantor's intention should be given effect if reasonably determinable. The facts in that case have nothing in common with those here.

The County further relies on the old California case of Scott v. Woodworth, 34 C.A. 400, 167 Pac. 543 (1917), which held a description too vague where no westerly boundary was given, nothing was stated from which it could be inferred, the described southerly boundary did not exist and the described north and east boundaries were actually on the west. The court further held that the document involved was not, and was not intended to be, a deed. Again the facts in that case having nothing in common with those here.

The suggestion made by the County that the description in the Butkovich deed does not close and has no westerly boundary is simply not true. Quoting from pages 11-12 of Appellants' Reply Brief on the prior appeal of this case:

> "The description here, property in Summit County, Utah, to wit: "all unplatted land in this Block (29 P.C.) and all land West of this Blk." with reference to the sale for delinquent taxes against the prior owners, D. C. McLaughlin Estate and Park City Townsite, refers to only one possible tract of land. The designation

> "P.C." is a standard, well-known abbreviation for property in the Park City Townsite in Summit County (Tr. 90-91), and such abbreviations "having local significance" are authorized by §59-11-6, U.C.A. This property description does not run West "to the Pacific Ocean, to the West line of Utah, Summit County or to the summit of the next mountain" as Colman so facetiously suggests [as Summit County also suggests, also facetiously]. It obviously runs to the West boundary of the Park City Townsite. There is only one Block 29 in the Park City Townsite and only one Park City Townsite in Summit County, Utah. Ownership in all the property West of the Park City Townsite was in the United States Government and was therefore not assessed (Tr. 88-90). There were no surrounding landowners to be confused by this description. It could not apply to any other land. Ferguson v. Mathis, 96 Utah 442, 85 P. 2d 827 (1938), relied upon by Colman, held the description of the property involved to be sufficient and not misleading and relied upon testimony of numerous witnesses that the alleged faults in the description were common parlance and that there was no other land in the County to which this description would apply. This is also true here."

If this argument is not sufficient to establish the point, then the stare decisis or res judicata effect of this court's decision on the prior appeal in this case should dispose of the matter. Again, this court held that the lower court's conclusion, that the description was vague, was "unwarranted" and pointed out that "expert testimony was to the effect that the description closed at a border line of Park City Townsite, by a well-known and commonly used abbreviation of 'P.C.' to describe the townsite situate in Summit County." It should be noted that the County's brief quotes testimony and facts from the transcript in the prior appeal of this case, all of which was before this court then. No new facts are present here, nor could any be introduced, to warrant any different conclusion than was reached there.

POINT V

WHETHER OR NOT THE AUDITOR'S AFFIDAVITS WERE ATTACHED TO THE ASSESSMENT ROLL IS NOT RELEVANT HERE. FURTHERMORE, THAT ALLEGED FACT NOWHERE APPEARS IN THE RECORD, WAS NOT BROUGHT BEFORE THE LOWER COURT AND CANNOT BE BROUGHT BEFORE THIS COURT.

The County has made the unsupported assertion in its brief that the auditor's affidavit was not attached to the assessment roll with respect to the property here involved. This is the first time in this case that this assertion has been made. It was not brought to the attention of the lower court. It appears nowhere in the record of this case. The law and practice of this court prevent a party from making such a claim for the first time on appeal, especially where there are no facts in the record to support the claim. First Equity Corp. v. Utah State University, ____ U. 2d ____, 544 P. 2d 887 (1975); Davis v. Mulholland, 25 U. 2d 56, 475 P. 2d 834 (1970).

Furthermore, the claim is irrelevant where the County has failed to establish its standing to challenge the validity of the Butkoviches title, as set forth in Point I of this brief, and where the County is barred by the statutes of limitations, as set forth in the first part of Point IV of this brief. And to be repetitious, if the deed to Butkoviches is void for lack of the auditor's affidavit, the County's assessments, auditor's deed and title are als void. The County gains nothing by this irrelevant argument.

CONCLUSION

This brazen attempt by Summit County to retake the property it sold to the Butkoviches, after having conveyed its entire interest to them and having collected the purchase price as well as taxes assessed thereon from them over many years, should be rejected by this court, as it was by the lower court. The County has not shown, nor even alleged, any impropriety on the part of the Butkoviches. It seeks merely to claim for itself the increased value of this property caused by inflation and surrounding development in recent years.

Summit County has no right to challenge the title of the Butkoviches because 1) it is estopped from challenging its own deed, 2) it is estopped from seeking an equitable decree quieting title when it has failed to do equity in offering to refund the purchase price and all taxes paid, (3) it has conveyed the entire interest in this property to the Butkoviches and retains no title at all, and 4) any interest it retained or has since obtained, inures to the benefit of its grantees. As to the County's arguments: 1) The statutory requirement of an undertaking doesn't apply to this case where the County is, in effect, the uninvited intervening party and has waived its right to assert that defense by failure to include that defense in its answer. 2) Summary judgment was entirely proper since all of the facts were in evidence, no material facts were in dispute and the Butkoviches were entitled to judgment as a matter of law. 3) The validity of the Butkoviches' title is irrelevant in this proceeding but if it was void, the County's title was likewise void. However, the

tax title description was adequate because it could apply to only one piece of property and no one was confused or misled by that description, least of all the County who assessed the property by that description. 4) The alleged failure of the auditor to attach his affidavit to the assessment roll appears nowhere in the record, is irrelevant, was not brought before the lower court and can't be raised for the first time on appeal. Therefore, the summary judgment entered by the lower court was the only proper decision that could have been made and should be affirmed by this court.

Respectfully submitted,

BACKMAN, CLARK & MARSH
Ralph J. Marsh

Attorney for Respondents